NO. 45765-2-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

B & R SALES, INC.,

A Washington Corporation:

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF LABOR AND INDUSTRIES,

Respondent.

Appeal from Superior Court of Thurston County
Cause No. 12-2-01976-0
BIIA Docket No. 12 21377

APPELLANT'S OPENING BRIEF

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A. Assignment of Error No. 1

The Appellant respectfully asserts that the Superior Court erred by affirming the Decision and Order of issued by the Board of Industrial Insurance Appeals on August 29, 2012 without applying the correct standard of review.

B. Assignment of Error No. 2

The Appellant respectfully asserts that the Superior Court erred by affirming the Decision and Order of issued by the Board of Industrial Insurance Appeals on August 29, 2012 because the findings and conclusions of the Superior Court, as such may be found in the Superior Court's letter Opinion or to the extent the Superior Court merely affirmed the findings and conclusions of the Board, are not supported by substantial evidence and are contrary to law.

II. ISSUES

A. Issue Pertaining to Assignment of Error No. 1

Did the Superior Court fail to apply the correct standard of review when not reviewing the matter de novo, but instead reviewing whether the Board's findings of fact and legal conclusions are supported by substantial evidence or constitute reversible error?

A. Issues Pertaining to Assignment of Error No. 2

a. Did substantial evidence support the finding that personal labor is the essence of the contract between the Firm and the subcontractors when all testimony and the contracts indicated specialized skills, specialized tools (not the usual hand tools) and specially modified vehicles were required in fact and under the contract and the subcontractors provided more than their personal labor in the nature of insurance, personal guarantees and indemnification of the Firm and was it an error of law to conclude the same?

b. Was it an error of law to conclude that legal entities, like corporations and limited liability companies, when parties to contracts for services may be ignored for the purposes stated under the Industrial Insurance Act as long as the Department ignores their existence when making an assessment for premiums?

c. Did the Superior Court and Board of Industrial Insurance Appeals err by making conclusions of law which ignore RCW 51.12.020 in spite of the facts demonstrating he subcontractors were excluded from the definition of "workers" as sole proprietors, partners, corporate officers or managing member of a limited liability company?

III. PROCEDURAL BACKGROUND

A. Procedural Posture

This case involves an appeal of the Notice and Order of Assessment No. 049770 issued by the Washington State Department of Labor and Industries (the "Department" and Respondent herein) on October 14, 2009 assessing industrial insurance taxes, interest and penalties against B & R Sales, Inc. (the "Firm" and Appellant herein) in the amount of $87,752.23 for quarters 1 through 4, inclusive, of 2008 based upon contracts between the Firm and 17 subcontractors during the audit period. (CABR 170-171).

The Firm timely mailed a Request for Reconsideration of the Department's assessment on November 9, 2009, and the Department held the order in abeyance until issuing an Order and Notice Reconsidering Notice and Order of Assessment No. 049770 which affirmed the original Notice and Assessment No. 049770 on May 17, 2011 (CABR 172).

The Firm then timely appealed to the Board of Industrial Insurance Appeals (BIIA) on May 20, 2011 (BIIA Docket No. 11 15872) (CABR 173), and, after the hearings on January 20, 24-25 and 31, in 2012, Industrial Appeals Judge Robert Raymond issued his Proposed Decision and Order on March 20, 2012. (CABR 139-168). Both the Department (CABR 36-85) and the Firm (CABR 86-111) separately filed Petitions for Review of that Proposed Decision and Order, and then, after considering both petitions for review, the Board issued the August 29, 2012 Decision and Order. (CP 64-77)

The Firm appealed the Board's August 29, 2012 Decision and Order to Thurston County Superior Court on September 26, 2012 (Thurston County Superior Court Case No. 12-2-01976-0). (CP 3-20). On January 28, 2014 the Superior Court Judge Chris Wickham issued Findings of Fact, Conclusions of Law & Judgment affirming the August 29, 2012 Decision and Order. (CP 381-384).

The Firm filed timely notice of appeal first on January 3, 2014 in response the letter opinion of the Judge Wickham filed on December 4, 2013. (CP 366-371, 372-380). The Firm's notice of appeal was amended on February 3, 2014 after entry of the Findings of Fact, Conclusions of Law & Judgment on January 28, 2014. (CP 381-384).

B. Factual Background

B & R Sales, Inc. is a retail seller of flooring materials, counter tops, and linoleum in Lacey, Washington, selling to residential and commercial customers who may merely purchase the materials or pay for them to be professionally installed. (CP 79-81; Gunderson 1/24/2012 Tr. p 8-9, 13)[1]. If the customer purchases installation, B & R may bid and hire an independent contractor to perform the installation. (CP 83; Gunderson 1/24/2012 Tr. p 13). The Firm also has had a contractor's license, BRSAL**334PF since October 1967 with a specialty in floor covering and countertops. (CP 85).

[1] References to the record transcripts will be referred to as "Tr."

Gary Gunderson is the Chairman of the Board for the Firm. (CP 87; Gunderson 1/24/2012 Tr. p 8, line 6). He first became associated with B & R Sales in March 1977. (CP 89; Gunderson 1/24/2012 Tr. p 9, line 25). Prior to that time, he had no experience in the floor covering installation industry, except to know that, "the fuzzy side went up." (CP 91; Gunderson 1/24/2012 Tr. p 10, line 16).

During the audit period, the Firm had five or six salespeople, three warehousemen, three in the office, a scheduler, and a customer service representative. (CP 93; Gunderson 1/24/2012 Tr. p 11, lines 16 – 18).

The ability to be able to professionally install product was not a requirement to sell it. (CP 95; Gunderson 1/24/2012 Tr. p 12, line 13). Moreover, the salespeople for the Firm do not have any "hands – on" the product installation. (CP 97; Gunderson 1/24/2012 Tr. p 12, line 26). If a customer is not capable of installation and does not have their own installer, they may request the Firm to provide a bid to install. (CP 99;

Gunderson 1/24/2012 Tr. p 13, lines 17 – 22).

All the subcontractors subject in this matter were hired because of their knowledge, personality, tools available, and vehicles available. (CP 101; Gunderson 1/24/2012 Tr. p 14, lines 12 – 13; CABR 375-385; Stipulation of Parties, Stipulation No. 1). When asked why, Mr. Gunderson testified:

"Well, we don't have that capability. We sell the product and we rely on professional subcontractors to install the product." (CP 103; *Id*, lines 15 – 16).

For carpet layers, Mr. Gunderson described the types of specialized tools: a power stretcher (a tool that weighs 50 pounds or more); knee kicker, 75 to 100 pound rollers, 3" and 6" heat steaming irons and power scrapers[2] to tear out carpets. (CP 105; Gunderson 1/24/2012 Tr. p 16, lines 7 – 9). These types of tools are specialty tools sold through specialty stores to

[2] A power scraper was described as follows: "…a machine on two wheels. It looks like it has an electric motor. It's about four, four and a half feet long with a handle that rises up towards the back and a large electric cord attached to it." (Gunderson 1/24/2012 Tr. 23, lines 15 – 19).

professional installers. (CP 107-108; Exhibits 9 and 10). They are not normal everyday hand tools. (CP 110; Gunderson 1/24/2012 Tr. p 20, line 24).

Mr. Gunderson testified that he does not personally use these kinds of tools. (CP 112; Gunderson 1/24/2012 Tr. p 18, line 3). Moreover, these tools are necessary to properly install the product. (CP 114; Gunderson 1/24/2012 Tr. p 22, line 1).

By contract, the installers are required to also provide material such as tack strips to install the carpet. The contractors are not reimbursed for the cost of these materials. (CP 116; Gunderson 1/24/2012 Tr. p 21, lines 14 – 26). Besides tack strips, the contractors are also required to provide all supplies for the installation of any product sold by the Firm. This includes: transition metals (12-feet long gold or silver); 12-foot long clamp down metals, heat seam tape, staples, as well as all adhesives that are required for different products. (CP 118; Gunderson 1/24/2012 Tr. p 22, lines 3 – 13).

The contract also requires the installers to supply their own vehicle to complete the job in a workmanlike manner. (CP 120-125; Exhibit 14, paragraph 2). It is not possible to use a regular passenger vehicle to perform this work as they are customized to handle 12-foot rolls of carpet, the 40-yard rolls of pad, pallets of tile and pallets of wood. They typically have a false floor (CP 127) where they store the 12-foot long metal transitions, or other tools; or are otherwise specifically modified for this work.[3] These vehicles are essential to the performance of the job and cannot be done without them. (CP129-130; Gunderson 1/24/2012 Tr. p 27, line 21 – page 28, line 7).

During the installation process, the installer has the right to hire employees, or subcontract out the work to another contractor. The Firm does not dictate who must perform the work. (CP 132; Gunderson 1/24/2012 Tr. p 26, lines 13 – 18). As set forth in the contract, Exhibit 14, Section 3 (CP 134-139),

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[3] See also, CP 214-216; Exhibits 11-13, a photograph showing an example of a false floor.

the means and method of performance of the contract is solely left to the discretion of the installer.

Section 3, entitled "Work Responsibility" of the contract, Exhibit 14 (CP 141-146), also requires the contractor to comply with "all relevant laws (including licensing requirements)".

Each of the 17 contractors was an independent contractor who had signed a written contract with the Firm. (CABR 375-385; Stipulation of Parties, Stipulation No. 2). Each of the 17 contractors was a registered contractor with the Department of Labor & Industries during the audit period. (CABR 375-385; Stipulation of Parties, Stipulation No.5).

Jeff Saner estimated that the cost of his tools in 2008 was between $18,000 and $20,000 and that his van was customized for his work. With the van and tools, Mr. Saner testified that total value was between $35,000 - $37,000. (CP 157-158; Saner 1/24/2013 Tr. p 88-89). Jeff Saner of Saner Installation, filed Schedule C in 2007 and could have claimed a business deduction for a portion of his home. (CP 160-161; Exhibit 5).

He testified he filed a "very similar" Schedule is C in 2008. (CP 163-164; Saner 1/24/2013 Tr. p 97-98).

Mr. Fluery testified the value of the tools used for GTF Installation in 2008 was $15,000 and his 1-ton industrial van was modified for his work. (Fluery 1/25/2013 Tr.p 40). His specialized tools were not available in ordinary hardware stores (Fluery 1/25/2013 Tr. p 36-40). GTF Installation was a sole proprietor during the audit period and had an account with Washington State Department of Revenue under which he reported his revenue. (Fluery 1/25/2013 Tr. p 35, 45-46). According to contract, GTF Installation personally guaranteed his work for two years, indemnified the Firm from liability for any damages caused by GTF Installation, and maintained general liability insurance in the amount of $1,000,000 per occurrence naming the Firm as an additional insured. (Fluery 1/25/2013 Tr. p 43-44). Each subcontractor who did not personally testify would testify "in a substantially similar manner" as GTF Installation. (Stipluation on the record,

Colloquy – 1/25/2012 Tr. p 49-50).

Michael Shultz Enterprises filed Schedule C and claimed a business deduction for his home office where he maintained a separate set of records. (CP 166-168; Exhibit 18).

Mr. Charles Soule believed he was eligible for a home office deduction for IRS filings, but chose not to claim one because he believed it would raise a red flag for audit purposes. (CP 170-171; Soule 1/24/2012 Tr. p 156, line 19 – p 157, line 7). He believed he qualified for a business deduction for two reasons: he is a sole proprietor and he uses his home to conduct his business and store materials. (CP 173; Soule 1/24/2012 Tr. p 162, lines 4 – 7). He has an extensive storage area and shelving system in his garage to store material. (CP 175; *Id.* at lines 9 – 12). He took tax accounting in college and he believed 90 percent usage of his home office qualified him to claim a home office expense. (CP 177; Soule 1/24/2012 Tr. p 163, lines 3 – 15).

Mark's Flooring, Mr. Huyck, "indicated that he has a home office that qualifies as the IRS deduction for home use although he does not use the deduction." (CP 179; Exhibit 1, Field Audit Report, page 4 of 10). Mark's Flooring provided to other persons during the audit period the same installation services provided per contract to B&R Sales. (Huyck 1/25/2012 Tr. P 178-179).

Dallen Bounds (Dal-Lyn Sales and Service) has an office, finished and converted garage to use solely for his business and for the tax deduction. (CP 181-182; Exhibit 1, p 1 – 2). He keeps his business records there. (CP 184; *Id* at 2).

Regarding Drapery Installation by Dave, the Department concluded, "Mr. Lanning provided his 2008 Sch C . . . and the deduction for business use of part of his home." (CP 186; Field Audit Report, page 5 of 10).

Woodland Carpets kept business records but only "a 'Ledger'". (CP 188; Exhibit 1, p 3). Similarly GTF Installations keeps records but only "keeps business of "Jobs Done" (CP

190; Exhibit 1, p 4).

The subcontractors testified that they understood that if they did not perform in a professional manner, they would have to purchase the material and further do all labor for free. If the customer did not want them back, then the independent contractor was obligated to pay the cost of installation by another contractor. For example, Mr. Zipperer from Cascade Tile testified that he actually lost money because of the two year guarantee set forth in Exhibit 14, section 6 (CP 135) when a different contractor replaced his work and he was obligated to pay for it. (CP 192-193; Zipperer 1/24/2012 Tr. p 123, lines 23 – 26; p 124, lines 1). Cascade Tile filed Schedule C and claimed a business deduction for his home office where he maintained a separate set of records. (CP 195-196; Exhibit 3).

Each of the contractors testified they needed to order their tools from specialized stores and could not purchase them from Home Depot or other consumer stores. Their tools are professional installation tools which they testified were

necessary for them to perform their jobs. See Exhibits 9 and 10 for catalogs showing their tools of trade (CP 198-199).

LT Carpet Works was first registered on December 1, 2008 with the Department of Revenue, the same date he opened his business. (CP 201; O'Connell 1/31/2012 Tr. p 93). Basic Flooring had its account reopened in 2008. (CP 203; *Id* at 89). Dal-lyn Sales and Service had an account in 2008. *Id.* Cascade Tile had an account in 2008. (CP 205; *Id* at 91). LT Carpet Works had an account in 2008. (CP 207; *Id* at 93). Northwest Custom Carpets had an account in 2008. (CP 209; *Id* at 94). Woodland Carpet had an account with the Department of Revenue in the first and fourth quarters of 2008. (CP 211-212; *Id* at 95-96).

IV. STATEMENT OF THE CASE

The Superior Court erred in affirming the Board's August 29, 2012 Decision and Order.

It does not appear the Superior Court applied the proper standard of review when concluding the Board's findings were

supported by substantial evidence and the Board's conclusions of law did not constitute reversible error.

Even if the Superior Court is found to have reviewed the matter according to the proper standard of review, in order to find the subcontractors herein were covered workers under the Industrial Insurance Act and affirm the Board's Decision and Order, both the Superior Court and the Board below made findings which are not substantially supported by the evidence and reversible conclusions of law.

V. ARGUMENT

Standard of Review

The standards for court appeals under the Washington State Industrial Insurance Act are the same as in other civil cases. RCW 51.52.140; *Benedict v. Department of Labor and Industries*, 63 Wn.2d 12, 15, 385 P.2d 380 (1963).

This Court taking appeal from the Superior Court reviews whether substantial evidence supports the lower court's factual findings and then reviews, de novo, whether that Court's

conclusions of law flow from the findings. *Ruse v. Dep't of Labor & Indus.,* 138 Wn.2d 1, 5, 977 P.2d 570 (1999). In this appeal, "review is limited to examination of the record to see whether substantial evidence supports the findings made after the superior court's de novo review, and whether the court's conclusions of law flow from the findings." *Id* (quoting *Young v. Department of Labor & Indus.,* 81 Wash.App. 123, 128, 913 P.2d 402 (1996) (citations omitted)). Under the "substantial evidence standard" there must be a sufficient quantum of evidence in the record to persuade a reasonable person that the declared premise is true. *Wenatchee Sportsmen Ass'n v. Chelan County,* 141 Wash.2d 169, 176, 4 P.3d 123 (2000).

Assignment of Error No. 1

Superior Court Standard of Review

The superior court conducts a de novo review of the BIIA's decision but relies exclusively on the certified board record. RCW 51.52.115; *Allison v. Department of Labor and Indus.,* 66 Wash.2d 263, 266, 401 P.2d 982 (1965). The BIIA's

findings and decision are prima facie correct and the party challenging the BIIA's decision has the burden of proof. *Id* at 267; *Ruse* at 5. The superior court affirms the BIIA's findings and decision unless they are found to be incorrect by a fair preponderance of the evidence. *Id.*

In the Superior Court's January 28, 2014 Findings of Fact, Conclusions of Law & Judgment, the Superior Court does not rely upon the proper standard of review, applying instead an appellate review standard for substantial evidence and reversible error rather than de novo review relying exclusively on the certified board record and a fair preponderance.

In the Court's December 4, 2013 letter Opinion the standard of review relied upon is somewhat less clear. While Judge Wickham's letter indicates a review of the certified board record, argument of the parties, and opines the Firm has "filed for a de novo review", Judge Wickham ultimately "upheld" the Board's decisions, in part at least, because in one case he found there was "sufficient basis in the record to uphold the Board";

in another the Board's decision was "similarly supported by the record."; and in a third the Board's "findings and conclusions are upheld as being supported by substantial evidence and in accordance with the law." (CP 369, 370).

If the Superior Court upheld the Board's Decision and Order applying the "substantial evidence" and "reversible error" appellate review standard rather than by "a fair preponderance of the evidence", the Superior Court's decision must be reversed.

Assignment of Error No. 2

A. Industrial Insurance Act, Independent Contractors, and Personal Labor

The subcontractors herein are independent contractors whose personal labor is not the essence of the contract. There is not substantial evidence in the record to support finding the subcontractors are workers covered under the Industrial Insurance Act.

The purpose of the Industrial Insurance Act is to provide

certain expedient relief to those coming within its provisions, i.e. "workers." RCW 51.04.010. Since 1937, the definition of workman (now "worker") has included coverage for independent contractors when the essence of the contract is his or her personal labor. RCW 51.08.180; *White v. Department of Labor and Indus.,* 48 Wash.2d 470, 471, 294 P.2d 650 (1956).

Personal labor is not the essence of the contract if an independent contractor "(a) ... must of necessity own or supply machinery or equipment (as distinguished from the usual hand tools) to perform the contract ... or (b) who obviously could not perform the contract without assistance ... or (c) who of necessity or choice employs others to do all or part of the work he has contracted to perform..." *White* at 474.

While considering the three factors in *White v. Department of Labor and Indus.* we look to the contract, the work to be done, the situation of the parties, and other attendant circumstances to determine whether the essence of the contract is personal labor; i.e. the realities of the situation rather than

any technical requirements of a test. *Cook v. Department of Labor and Indus.*, 46 Wn.2d 475, 476, 282 P.2d 265 (1955). RCW 51.08.180 was "intended to protect workmen ... in those situations where the work could be done on a regular employer-employee basis but where, because of the time, place, manner of performance, and basis of payment, it could be urged that the workman was an independent contractor rather than an employee." *White* at 474.

The *White* Test

The Whites orally contracted with the Steiner mill to "yard out and cold deck the logs." *White* at 475. The Whites were to move their donkey engine (a steam powered winch) onto Steiner's property. *Id.* "Mrs. White testified that they were approached about doing the work because 'we had equipment.'" *Id.* In other words, the primary object of the contract between the Steiner mill and the husband and wife team was to move and stack logs to be milled. However, the "essence" of the contract was more than mere labor personally supplied by the

Whites. *Id* at 474. While it is true the Whites could have hauled those logs personally by hand with "the usual hand tools", the contract required the Whites use their donkey engine.

Lloyd's of Yakima

The Superior Court and the Board rely heavily upon another Division II appellate case, *Lloyd's of Yakima Floor Center v. Department of Labor and Industries of the State of Washington*, 33 Wn. App. 745 (Wash.App. Div. 2 1982). In *Lloyd's,* the Court held that three carpet layers (independent contractors) for a floor store were covered workers because their labor was only personal services:

> The unchallenged findings of fact concerning the arrangements between the installers and Lloyd's for the "package" option with which we are concerned are:
> At all pertinent times herein, the three above-mentioned carpet layers were engaged, predominantly, in laying carpet for the employer under *verbal contracts*, the terms of which were renegotiated every six months or so.
> Finding of Fact 3.
> *During the period in question it was normal procedure for this employer to negotiate directly with a customer the terms and price of a package deal which included the cost of and profit mark-up on the carpet or flooring materials, the installation labor, and the installation materials*. The time of installation

was generally arranged by the employer ascertaining from the customer a desired date for installation and then communicating with one or more of the three above mentioned carpet layers, after which he would select the carpet layer most readily available. During the time period in question, the understanding between Lloyd's of Yakima and the three carpet layers was that if a package deal customer did not pay his bill, the carpet layer who did the installing work would nevertheless be paid pursuant to their negotiated agreement, and Lloyd's of Yakima undertook the expense of collection and the risk of loss in these situations.

Finding of Fact 4.

During the above-mentioned period, the agreement between the carpet layers and the employer provided that the employer would collect the total cost of the carpet plus the installation charge from the customer, and transmit the amount due for installation to the carpet layer at a later date.

Finding of Fact 5.

The carpet layers each owned a truck, and the tools of their carpet-laying trade. *These tools were worth in the aggregate, several hundred dollars, but were mostly relatively small tools, such as belt sanders, and routers, weighing in the neighborhood of ten pounds, and classified as hand tools.*

Finding of Fact 6.

During the period in question, the employer did not exercise any control over the methods used by the above-mentioned carpet layers in performing their carpet-laying services for customers of the employer.

Finding of Fact 8. Additionally, the trial court found;

All of the above-mentioned carpet layers were experts in their field and *the agreement between the parties, including the employer, contemplated that if one of them was chosen to lay the carpet that he would perform the services himself.* During the period in question none of the three carpet layers had any employees. ...the installers did furnish tools consisting

primarily of the usual hand tools of the trade. These tools were relatively inexpensive, costing approximately $3,000. They were also required to furnish a truck to transport the floor covering materials to the customer's residence. We do not believe that a truck used to transport floor covering materials to a jobsite is the type of necessary machinery or equipment which, under WHITE, would take this agreement outside the operation of the act. *Lloyd's of Yakima* at 749-750. (Emphasis added).

The essence of the contract between *Lloyd's of Yakima* and the carpet layers was personal labor. *Id.* In other words, the "essence" of the contract was the labor personally provided by the individuals contracting to provide service. To put it another way, the situation of the parties and other attendant circumstances indicated the work could be done on a regular employer-employee basis but where, because of the time, place, manner of performance, and basis of payment, it could be urged that the carpet layers were independent contractors rather than an employees.

In this case, the Board held "Based on the contract, the testimony of the installers, and the testimony of Gary Gunderson, the chairman of the board for B & R, there is no

doubt that the reason B & R entered into the contracts with the installers was to obtain their services installing the products sold by B & R. That was clearly the primary object of the contract, not the tools the installers used to do the job." (CP 67). The Superior Court found "it appears clear that the contract was primarily about installation of carpets, not transportation. The determination that personal labor was the essence of the contract is upheld." (CP 369).

The present case is distinguishable from *Lloyd's*, and the substantial evidence of the record supports finding the subcontractors herein are, like the Whites, independent contractors whose personal labor is not the essence of the contract.

Unlike the three carpet layers in *Lloyd's*, the 17 subcontractors each signed a written contract with B & R Sales. (CP 120-125). The written contract demonstrates more than personal labor was required by the subcontractors.

In section 2 of the contract, the subcontractors were required to provide a vehicle and all tools and supplies needed to perform the contract. Supplies included 12" gold and silver transition materials, tack strip, various adhesives for carpet, vinyl, laminate and ceramic, and other supplies needed to complete the installations. The three carpet layers in *Lloyd's* did not provide any supplies while the 17 subcontractors here were contractually responsible for these costs.

In addition to bearing risk of loss and part of the costs of installation, the 17 subcontractors were required to own more than the usual hand tools. While installers in Lloyd's had tools which were "relatively small" "hand tools" "such as belt sanders, and routers, weighing in the neighborhood of ten pounds" worth "in the aggregate, several hundred dollars," the 17 subcontractors had tools costing between $15,000 and $20,000. Each of the subcontractors testified they needed to order their tools from specialized stores and could not purchase them from Home Depot or other consumer stores. Their tools

are professional installation tools and necessary to perform their jobs. (CP 107-108; Exhibits 9 and 10). Although the tools may be standard for the industry they are not, and are easily distinguished from, the usual hand tools. Routers and sanders are usual hand tools. "Power stretchers", "knee kickers", "75 to 100 pound rollers" and "power scrapers" are not usual hand tools.

The *White* test compares "machinery or equipment (as distinguished from the usual hand tools)." *White v. Department of Labor and Indus.*, 48 Wash.2d 470, 474, 294 P.2d 650 (1956). The important distinction is not whether the tools are operated by hand, but whether the tools are "usual." In other words, were the subcontractors "approached" as Mr. and Mrs. White "because '[they] had equipment'", or did the Firm contract with the subcontractors for their labor assuming they would have "the usual hand tools." *Id* at 475, 474. In this case, the subcontractors were contractually obligated to have the necessary equipment in section 2 of their contract. Like *White*

they were "approached" because they "had equipment." (CP 101; Gunderson 1/24/2012 Tr. p 14, lines 12 – 13; CP 103; *Id*, lines 15 – 16))

Furthermore, ignoring the difference in cost between *Lloyds* and this case for the sake of argument, the equipment described in testimony in this case, "Power stretchers", "knee kickers", "75 to 100 pound rollers" and "power scrapers" for example (CP 105; 107-108; 110), are significantly different from the "relatively small" "hand tools" "such as belt sanders, and routers, weighing in the neighborhood of ten pounds" described in *Lloyds*. The equipment in this case is large and heavy. The equipment required of the subcontractors is not "usual hand tools."

Unlike *Lloyd's*, the subcontractors were contractually obligated to use commercial vans, not assumed to use passenger vehicles, to transport their tools and material to the customer's jobsite. (CP 213-216; Exhibits 11, 12 and 13). The false flooring in commercial vans, specialized shelving, and

modifications to the vans establish that they provided more than usual hand tools. The testimony indicated special modifications were required in order for these vehicles to meet the requirements of the contract. Like the Whites, the subcontractors were contractually obligated to perform under contract with commercial equipment, like a donkey engine.

Unlike the contracts for carpet layers in *Lloyd's*, the work to be performed under the subcontractors' contract with the Firm could be done on a regular employer-employee basis because they were contractually obligated to share the risk of the contract.

In section 6 of the contract, the subcontractors guarantee their work at their own expense. The three carpet layers in *Lloyd's* had no exposure to loss, did not guarantee their work nor assume the loss of replacement. The 17 subcontractors bore the risk, if they did not perform the work satisfactorily. Cascade Tile testified he lost money on a job because of this guarantee. In section 9 of the contract, the subcontractors were required to

purchase, at their own cost, insurance with general liability coverage of $1 million per occurrence and $2 million for the policy aggregate, well above their $6,000 bond, naming the Firm as an insured. The three carpet layers in *Lloyd's* were not so obligated, nor did they provide insurance to *Lloyd's*. In section 7 of the contract, the subcontractors agreed to indemnify and hold harmless the Firm against any and all claims, and to further tender costs of attorney's fees to the Firm. The three carpet layers in *Lloyd's* provided no such indemnification.

All of the evidence supports the Firm contracted with subcontractors because of their expertise, equipment and vehicles. Each of the subcontractors had specialties: carpet, vinyl, tile, laminate, ceramic windows and countertops. These specialties required specialized tools. These were clearly not ordinary hand tools, and they were clearly a necessity to perform the contract. Therefore, the essence of the contracts herein is not "personal labor" and the subcontractors are not "workers." Additionally, the subcontractors were contractually

obligated to perform in ways that no employee could have performed: insurance well above the required bond; a guarantee of their work; indemnification and to hold harmless the Firm against any and all claims, and to further tender costs of attorney's fees to the Firm; all the tools and the supplies necessary to perform the contract; and a vehicle specially designed for their line of work. Satisfaction of these contract terms were necessary to perform their contract, and so, show that the contracts in this case were for more than merely personal labor. It is true that labor was necessary to perform these contracts, as in *Lloyds*. It is also true the primary pupose of the contracts was to complete a job. However, it is arguably true in every contract that some personal labor is required, and every contractor is primarily contracted to complete a job. If we accept the finding below is supported by substantial evidence according to law, then the essence of every contract is personal labor.

In this case substantial evidence does not support the findings of the Board or the Superior Court that the subcontractors here are covered workers. In fact, the subcontractors, like the Whites, are independent contractors not covered by the Industrial Insurance Act.

B. Corporations and LLCs as independent contractors

It is an error of law to conclude the contracts between the Firm and the Subcontractors that are legal entities are not contracts the essence of which is more than personal labor when, by necessity, the legal entity must employ others to do all or part of the work it has contracted to perform.

Personal labor is not the essence of the contract if an independent contractor "...obviously could not perform the contract without assistance ..." *White* 48 Wn.2d at 474. If the contracting parties must have known that, as to a substantial part of the work, it would not be practicable for the independent contractor to carry out the contract without assistance, the essence of the contract is not personal labor. *Id* at 473; *Cook v.*

Department of Labor and Industries, 46 Wash.2d 475, 282 P.2d 265 (1955). Cook had a contract with a lumber company to cut, skid, load, and haul certain timber owned by the company, for twenty-five dollars a thousand feet. Cook owned, and used in the performance of the contract, a chain saw, tractor, and truck. One person could cut, skid, and haul the timber, but it was impracticable, though perhaps not impossible, for one person to load the truck. Cook had no employees, but his wife operated the truck for part of each day to aid in the loading. Because the contracting parties must have known it would not be practicable for Cook to carry out the contract alone his personal labor was not the essence of his contract.

It is well established that a corporation can only act through its regularly appointed officers and agents. *State v. Tacoma Ry. & Power Co.*, 61 Wash. 507, 512, 112 P. 506 (1911); *Beall v. Pacific Nat. Bank of Seattle*, 55 Wn.2d 210, 212, 347 P.2d 550 (1959); *Frigidaire Sales Corp. v. Union Properties, Inc.*, 88 Wn.2d 400, 406, 562 P.2d 244 (1977).

Similarly a limited liability company can act only through its agents or members. *Columbia Community Bank v. Newman Park, LLC*, 166 Wn.App. 634, 646, 271 P.3d 300 (Wash.App. Div. 2, 2012); *Marina Condo. Homeowner's Ass'n v. Stratford at the Marina, LLC*, 161 Wash.App. 249, 263, 254 P.3d 827 (Wash.App. Div. 1, 2011).

As the lumber company in *Cook*, the Firm must have known the fictitious entity with which they were contracting would obviously not perform the contract without the assistance of agents.

The Board and the Superior Court erred in finding the record supported the idea that "this is not a situation where B & R contracted with a corporation, a partnership, and a limited liability company to provide the labor ..." (CP 71). Nothing could be farther from the truth, and all substantial evidence clearly contradicts this finding. The record does nothing but support a "situation where [the Firm] contracted with a corporation, a partnership, and a limited liability company."

The Firm did in fact contract with such entities; then the subcontractors chose which individuals would perform under the contract. The contract specifically permitted them to choose others to perform under the contract, and such entities would be required to do so in order to complete the job. In essence the Board's Decision and Order "pierces the corporate veil" in order to make the Firm liable for the premiums of the subcontractor's agent or alternatively reforms the contract to change the identity of the subcontractor.

Neither the evidence nor the law support such a finding or conclusion.

C. Excluded is excluded

Sole proprietors or partners are expressly excluded from mandatory coverage and are not required to participate in Washington's workers' compensation system. RCW 51.12.020 (5). Neither are they considered "workers" nor "employees" automatically covered under the statute. *Berry v. Department of Labor & Indus.*, 45 Wash.App. 883, 884-85, 729 P.2d 63

(1986) (holding partner killed in helicopter crash is not "worker" under the Industrial Insurance Act and is not entitled to mandatory coverage); see RCW 51.08.180, 51.08.185.

Sole proprietors or partners may opt into the system under RCW 51.12.110 and 51.32.030, but unless they opt in, they are excluded. See *Johnson v. Department of Labor & Indus.*, 33 Wash.2d 399, 404-05, 205 P.2d 896 (1949) (holding partners are excluded from coverage unless they request it in writing prior to the date of injury); See also *Department of Labor and Industries of State of Wash. v. Fankhauser*, 849 P.2d 1209, 121 Wn.2d 304, 309-310 (1993) (holding Fankhauser and Rudolph although excluded as sole proprietors under the last injurious exposure rule were not barred because they had been covered for injuries caused by exposure during prior employment that was not excluded.).

Similarly "bona fide" officers of corporations and managing members of limited liability companies are excluded. RCW 51.12.020(8), (13).

There are 14 sole proprietors, one corporation, one partnership and one limited liability company with whom the Firm contracted during the audit period. Each of those entities are exempt from coverage under the Industrial Insurance Act. RCW 51.12.020 (5); (8); (13).

The case law is clear. Sole proprietors, partners, and certain corporate officers are expressly excluded from mandatory coverage; they are not considered "workers" nor are they "employees" automatically covered under the statute. *Berry*, 45 Wash.App.at 884-885. The liberal construction of the Act, required by its terms, RCW 51.12.010, only applies to "in favor of persons who come under the Act's terms." *Id* at 884. It does not apply to defining who those persons might be covered under the Act. *Id.*

It may be argued that such a reading of the law "repeals" RCW 51.08.180 and RCW 51.08.181, however the Court in *Fankhauser* specifically considered RCW 51.08.180. *Id* at 310. Fankhauser was exposed at Hub Brakes, and Rudolph was exposed at various carpentry jobs. *Id* at 309. As sole proprietors and partners they were excluded from receiving compensation benefits under the Act for disease or injuries sustained during their self-employment unless they request coverage prior to the date of injury or disease. *Id* at 310. This ruling does not "repeal" RCW 51.08.180 and RCW 51.08.181 because they may opt into the system under RCW 51.12.110 and 51.32.030. *Id.* As in those cases, the subcontractors in this case are excluded from mandatory coverage under the Act.

VI. CONCLUSION

Based on the foregoing, the Superior Court's decision affirming the Board's August 29, 2012 Decision and Order should be reversed, and the Appellant respectfully urges this Court to direct the Superior Court to reverse the Board's

August 29, 2012 Decision and Order, to vacate the assessment, and to remand this matter back to the Board for any further proceedings.

DATED this 7th day of April, 2014.

AMS LAW, P.C.

By: _____

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CERTIFICATE OF SERVICE

I, Jordon Murray, hereby certify under penalty of perjury under the laws of the State of Washington that on April 7, 2014, I filed with the Court of Appeals Division II, via ABC Legal Messenger, postage pre-paid, the original and one copy of the following document:

1. **APPELLANT'S OPENING BRIEF**

and that I further served a copy via Facsimile and U.S. mail, postage pre-paid, upon:

Katy Dixon
Assistant Attorney General
Office of the Attorney General
Labor & Industries Division
7141 Clearwater Drive SW
Olympia, WA 98504-0121

SIGNED in Lacey, Washington on April 7, 2014.

Jordon Murray